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Sulaiman & Taye v Borneo Synergy (M) Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-22NCVC-536–11 OF 2015
NORDIN HASSAN J
17 NOVEMBER 2017

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Contract — Oral Agreement — Existence of oral agreement — Defendant denied existence of oral agreement — Prove based on contemporaneous documents — Whether there was privity of contract between parties on alleged agreed fees — Whether there was oral agreement between parties

D

Legal Profession — Remuneration — Agreement on costs — Whether s 116 of the Legal Profession Act 1979 ('the Act') mandatory provision — Whether there was violation of ss 118 and 121 of the Act — Whether there was oral agreement — Whether fixed legal fees fair and reasonable

E

Tort — Negligence — Professional negligence — Defendant counterclaimed against plaintiff for negligence in conduct of suit by plaintiff — Whether res judicata applicable — Whether defendant proved negligence act by plaintiff

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Sulaiman & Taye ('the plaintiff') brought this action against Borneo Synergy (M) Sdn Bhd ('the defendant') for unpaid legal fees and disbursements amounting to RM277,386.80. In relation to this, the plaintiff relied on the evidence of the invoice No 0063 dated 3 July 2013 ('the invoice') which stated that RM260,000 as agreed fees and RM15,600 as 6% service tax. In response to the said invoice, the defendant, vide a letter dated 10 July 2013 disputed the work done by the plaintiff as stated in the invoice and argued that the fees were unjustified and oppressive. In the present case, the defendant averred that there was no agreement for lump sum legal fees between the parties as: (a) no bill was issued immediately after the alleged oral agreement; and (b) the bill issued by the plaintiff did not mention about the lump sum agreed fees. The defendant further submitted that any agreement as to costs must be in writing and signed by parties as required under s 116 of the Legal Profession Act 1979 ('the LPA'). The defendant also pleaded that the alleged oral agreement violated ss 118 and 121 of the LPA and such agreement was void and invalid. Moreover, the alleged oral agreement was vague, unclear and unspecific to be an enforceable agreement. The defendant also submitted that there was no privity of contract between the plaintiff and the defendant as the alleged oral agreement as to fees was between another law firm and the defendant instead of the plaintiff. This

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A was because one of the partners ('PW1') in the plaintiff had brought in the defendant as a client when he left his previous law firm. PW1 had entered into an alleged oral agreement with the defendant whilst he was still in employment in his previous law firm. The defendant contended that if there was such an agreement, the amount of RM275,000 for legal fees was unfair and
B unreasonable. The defendant had also filed a counterclaim against the plaintiff for a sum of RM1,941,438 on grounds of negligence for: (i) failing to adduce available evidence to prove damages in the suit which the plaintiff had conducted for the defendant ('Suit 689'); and (ii) failing to adduce evidence and/or submit that interest on judgment sum should be awarded from the date
C of the writ and not from the date of judgment of Suit 689. The plaintiff counter argued that the defendant's counterclaim was unsustainable on grounds of immunity and res judicata. In the present action, the parties relied on the evidence of Mr Sng Eu Kim (PW1), Mr Cyril Oliver, a lawyer ('PW2') and also
D the defendant's director ('DW1').

Held, allowing the plaintiff's claim and dismissing the defendant's counterclaim with cost of RM15,000 against the defendant subject to payment of allocator fee:

E (1) The word 'may' in s 116(1) of the LPA should be given its ordinary and natural meaning which was, it was permissive and not mandatory unless it could be shown otherwise. In the present case, there was nothing to indicate or basis to conclude that the word 'may' in s 116(1) of the LPA,
F should be read as 'shall' or 'must'. The word 'may' here gave the option for advocate and solicitor whether to have a written agreement for the legal costs with the client or otherwise (see paras 14–15 & 17).

(2) Subsection 118(1) of the LPA clearly referred to an agreement pursuant to s 116 of the LPA which was an agreement in writing and signed by the
G client which was not the situation in the present case. Thus, s 118 was not applicable. Further, the plaintiff's case was that the plaintiff remuneration was fixed sums agreed by both parties, as such, there was no infringement of s 121(1)(a) of the LPA by the plaintiff (see paras 21–22).

H (3) The invoice and the defendant's letter dated 10 July 2013 which was a contemporaneous document corroborated the oral evidence of PW1 and PW2 regarding the said oral agreement of legal fees amounting to RM260,000. Thus, on the balance of probabilities, there was an oral agreement between PW1 and DW1. In addition, the court found that
I the contention that the amount agreed was vague and unclear was untenable because the evidence of PW1, PW2 and the invoice showed that the agreed fix legal fees was clear and specific which was the sum of RM260,000. The court further found that, based on the work done by

the plaintiff, the fees was fair and reasonable. In totality, the oral agreement was enforceable pursuant to ss 9 and 10 of the Contracts Act 1950 (see paras 32–36).

(4) With reference to the argument raised by the defendant that there was no privity of contract between the plaintiff and the defendant, the court held that this was not in the defendant's pleaded case, hence this issue could not be considered by the court. In any event, DW1 did not object when PW1 continue to handle DW1's case when PW1 moved to Sulaiman & Taye. As such, the defendant had acquiesced by his conduct (see paras 38–39).

(5) What was adjudicated in Suit 689, inter alia, was whether the defendant had proved the special damages, nevertheless, in the present case, the defendant's counterclaim was premised on the negligence of the plaintiff in conducting the case. This was two separate cause of action and the decision in the present case would be based on a different consideration. Moreover, the parties in the present suit and Suit 689 were different. As such, the principle of res judicata was not applicable in the present case (see para 51).

(6) The defendant had a duty to prove negligence and it had failed to prove the negligence act by the defendant in conducting Suit 689. In Suit 689, the judgment was decided in favour of the defendant. Further, the plaintiff had brought to the court's attention with regards to the available evidence to prove damages for the court's determination. The interest pleaded on behalf for the defendant in Suit 689 was from the date of the writ. In totality, there was no negligence case against the plaintiff (see paras 52 & 54–61).

[Bahasa Malaysia summary

Sulaiman & Tay ('plaintif') telah memulakan tindakan ini terhadap Borneo Synergy (M) Sdn Bhd ('defendan') untuk fi guaman yang tidak dibayar dan wang pendahuluan berjumlah RM277,386.80. Sehubungan itu, plaintif telah bergantung kepada keterangan invois No 0063 bertarikh 3 Julai 2013 ('invois tersebut') yang menyatakan bahawa RM260,000 sebagai fi yang dipersetujui dan RM15,600 sebagai 6% cukai perkhidmatan. Dalam menjawab kepada invois tersebut, defendan melalui surat bertarikh 10 Julai 2013 mempertikaikan kerja yang dilakukan oleh plaintif sebagaimana dinyatakan dalam invois tersebut dan berhujah bahawa fi itu tidak wajar dan menindas. Dalam kes ini, defendan menegaskan bahawa tiada perjanjian untuk fi guaman sekaligus antara pihak-pihak kerana: (i) tiada bil dikeluarkan dengan segera selepas perjanjian secara lisan yang dikatakan itu; dan (ii) bil yang dikeluarkan oleh plaintif tidak menyatakan tentang fi sekaligus yang dipersetujui itu. Defendan selanjutnya berhujah bahawa apa-apa perjanjian tentang kos perlu secara bertulis dan ditandatangani oleh pihak-pihak sebagaimana dikehendaki

di bawah s 116 Akta Profesyen Undang-Undang 1979 ('APU'). Defendan juga mempli bahawa perjanjian lisan yang dikatakan itu telah melangar ss 118 dan 121 APU dan perjanjian sedemikian adalah tidak sah. Tambahan pula, perjanjian lisan yang dikatakan itu adalah taksah, tidak jelas dan tidak spesifik untuk merupakan perjanjian yang boleh dikuatkuasakan. Defendan juga berhujah bahawa tiada priviti kontrak antara plaintif dan defendan kerana perjanjian lisan yang dikatakan berhubung fi itu adalah antara firma guaman dan defendan dan bukan plaintif. Ini adalah kerana salah seorang daripada rakan kongsi ('PW1') kepada plaintif telah memasukkan defendan sebagai anak guam apabila dia meninggal firma guamannya terdahulu. PW1 telah memasuki perjanjian lisan yang dikatakan dengan defendan semasa dia masih bekerja di firma guaman terdahulunya. Defendan berhujah bahawa jika tiada perjanjian sedemikian, jumlah RM275,000 untuk fi guaman adalah tidak adil dan tidak munasabah. Defendan juga memfailkan tuntutan balas terhadap plaintif untuk jumlah RM1,941,438 atas alasan kecuaian kerana: (i) gagal mengemukakan keterangan sedia ada bagi membuktikan ganti rugi dalam guaman yang tleah dijalankan oleh plaintif untuk defendan ('Guaman 689'); dan (ii) gagal mengemukakan keterangan dan/atau mengemukakan faedah ke atas jumlah penghakiman yang patut diawardkan dari tarikh writ dan bukan dari tarikh penghakiman untuk Guaman 689. Plaintif membalas hujah bahawa tuntutan balas defendan tidak boleh dikekalkan atas alasan kekebalan dan res judicata. Dalam tindakan ini, pihak-pihak bergantung kepada keteranan Encik Sng Eu Kim (PW1), Encik Cyril Oliver, seorang peguam ('PW2') dan juga pengarah defendan ('DW1').

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan dengan kos RM15,000 terhadap defendan tertakluk kepada bayaran fi alokator:

(1) Perkataan 'may' dalam s 116(1) APU tersebut hendaklah diberikan maksud biasa dan semulajadinya iaitu, ia adalah permisif dan tidak mandatori kecuali jika ia dapat ditunjukkan sebaliknya. Dalam kes ini, tiada apa yang menunjukkan atau menjadi asas untuk membuat kesimpulan bahawa perkataan 'may' dalam s 116(1) APU, hendaklah dibaca sebagai 'shall' atau 'must'. Perkataan 'may' di sini tidak memberikan pilihan untuk peguambela dan peguamcara sama ada untuk mempunyai perjanjian bertulis untuk kos guaman dengan anak guam atau sebaliknya (lihat perenggan 15–16 & 18).

(2) Subseksyen 118(1) APU jelas merujuk kepada perjanjian menurut s 116 APU yang merupakan perjanjian bertulis dan ditandatangani oleh anakguam yang mana bukan situasinya dalam kes ini. Oleh itu, s 118 tidak boleh terpakai. Selanjutnya, kes plaintif adalah bahawa saranan plaintif adalah jumlah tetap yang dipersetujui oleh kedua-dua pihak, oleh itu, tiada pelanggaran s 121(1)(a) APU tersebut oleh plaintif (lihat perenggan 22–23).

(3) Invois tersebut dan surat defendan bertarikh 10 Julai 2013 yang merupakan dokumen sedia ada menyokong keterangan lisan PW1 dan PW2 berkaitan perjanjian lisan tersebut berhubung fi guaman berjumlah RM260,000. Oleh itu, atas imbangan kebarangkalian, terdapat perjanjian lisan antara PW1 dan DW1. Selain itu, mahkamah mendapati hujah bahawa jumlah yang dipersetujui adalah taksa dan tidak jelas tidak dapat dipertahankan kerana keterangan PW1, PW2 dan invois tersebut menunjukkan bahawa fi guaman tetap yang dipersetujui adalah jelas dan spesifik yang berjumlah RM260,000. Mahkamah selanjutnya mendapati bahawa, berdasarkan kerja yang dilakukan oleh plaintif, fi tersebut adalah adil dan munasabah. Keseluruhannya, perjanjian lisan itu boleh dikuat kuasakan menurut ss 9 dan 10 Akta Kontrak 1950 (lihat perenggan 33–37).

(4) Dengan merujuk kepada hujah yang ditimbulkan oleh defendan bahawa tidak terdapat priviti kontrak antara plaintif dan defendan mahkamah memutuskan bahawa ini bukan dalam kes yang dipli oleh defendan, justeru isu ini tidak boleh dipertimbangkan oleh mahkmah. Dalam apa keadaan, DW1 tidak membantah apabila PW1 meneruskan untuk mengendalikan kes DW1 sewaktu PW1 berpindah ke Sulaiman & Taye. Oleh itu, defendan telah bersetuju melalui perbuatannya (lihat perenggan 38–39).

(5) Apa yang diadili dalam Guaman 689, antara lain, adalah sama ada defendan telah membutikan ganti rugi khas, walau apa pun, dalam kes ini, tuntutan balas defendan adalah berdasarkan kecuaian plaintif dalam mengendalikan kes itu. Ini adalah dua kausa tindakan berasingan dan keputusan dalam kes ini adalah berdasarkan pertimbangan yang berbeza. Tambahan pula, pihak-pihak dalam guaman ini dan Guaman 689 adalah berbeza. Oleh demikian, prinsip res judicata tidak terpakai dalam kes ini (lihat perenggan 51).

(6) Defendan mempunyai kewajipan untuk membuktikan kecuaian dan ia telah gagal membuktikan perbuatan cuai oleh defendan dalam mengendalikan Guaman 689. Dalam Guaman 689, penghakiman telah membuat keputusan yang menyebelahi defendan. Selanjutnya, plaintif telah membawa perhatian mahkamah berkaitan keterangan yang sedia ada untuk membuktikan ganti rugi bagi penentuan mahkamah. Faedah yang dipli bagi pihak defendan dalam Guaman 689 adalah dari tarikh writ. Keseluruhannya, tiada kes kecuaian terhadap plaintif (lihat perenggan 52 & 54–61).]

Notes

For cases on agreement on costs, see 9 *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2108–2110.

For cases on existence of oral agreement, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6249–6255.
For cases on professional negligence, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1716–1816.

Cases referred to

Asbir, Hira Singh & Co v Supramaniam a/l Pitchaimuthu & Ors [2000] 1 MLJ 83; [2000] 1 CLJ 7, HC (refd)
Dato' Dr Zambry bin Abd Kadir v Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin (Attorney General of Malaysia, intervener) [2009] 5 MLJ 464, CA (refd)
Dato' HL Wrigglesworth v Haji Zakaria bin Yusoff [1995] MLJU 124; [1995] 3 CLJ 64, HC (refd)
Eng Mee Yong & Ors v Letchumanan [1979] 1 LNS 18, PC (refd)
Gurbachan Singh s/o Bagawan Singh & Anor v Vellasamy s/o Pennusamy & Ors and other applications [2012] 2 MLJ 149; [2012] 2 CLJ 663, FC (refd)
Lim Soh Wah & Anor v Wong Chong & Anor & Another Appeal [2001] 1 MLRA 116, CA (refd)
MH Land Sdn Bhd & Anot v Ribbon Marketing Sdn Bhd & Ors [2016] 6 CLJ 99, HC (refd)
Maelstrom Resources Sdn Bhd and Anor v Shearn Delamore & Co (disaman sebagai firma) [2006] MLJU 473; [2007] 1 CLJ 50, HC (refd)
Majid v Muthusamy [1968] 2 MLJ 89, FC (refd)
Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal [2015] 6 MLJ 492, FC (refd)

Legislation referred to

Contracts Act 1950 ss 9, 10
Legal Profession Act 1976 ss 116, 118, 118(1), 121(1)(a)

Godfrey D'Cruz (Godfrey D'Cruz Co) for the plaintiff.
Jasvinjit Singh (Jasvinjit Singh & Co) for the defendant.

Nordin Hassan J:

INTRODUCTION

[1] The plaintiff, a law firm, brought this action against the defendant for unpaid legal fees and disbursements amounting to RM277,386.80.

BACKGROUND FACTS

[2] Based on the evidence presented in the trial, the relevant facts of this case be summarised as follows:

(a) the plaintiff is a firm of advocates and solicitor practising in the name of Sulaiman and Taye. One of the plaintiff's partners is Mr Sng Eu Kim ('PW1'); A

(b) the defendant is an engineering company which was incorporated in Malaysia. In middle of 2010, Mr Yong Yu Ken ('DW1'), a director of the defendant had met with Mr Cyril Oliver Xavier ('PW2'), a lawyer, and asked his advise in finding a suitable lawyer to handle the defendant's pending suite against one main contractor and to replace the lawyer from legal firm, Shook Lin & Bok who was then handling the case for the defendant; B C

(c) thereafter, Mr Cyril ('PW2') brought DW1 to a legal firm, Messrs Sng & Co and introduced DW1 to Mr Sng ('PW1') who was a partner with the firm;

(d) in the said meeting, PW1 as partner of Sng & Co was retained by the defendant to act for the defendant and to take the conduct of the defendant pending suit from Shook Lin & Bok which was Kuala Lumpur High Court Civil Suit No S1–22–689 of 2005 ('Suit 689'); D

(e) in this Suit 689, the defendant sued the main contractor Perbadanan Perwira Harta Sdn Bhd ('PPHSB') as first defendant and the sole shareholder of PPHSB and Perbadanan Perwira Harta Malaysia ('PPHB') as the second defendant, for failing to pay the balance of the costs of piling works in the sum of RM1,082,759.18 and wasted expenditure incurred by the plaintiff in the amount of RM1,921,438, allegedly caused by the delay to the works by the main contractor; E F

(f) in the same meeting, when DW1 met with PW1 at the firm Sng & Co, according to PW1 and PW2, a lump sum legal fees were agreed upon by DW1 and PW1 for the amount of RM260,000 excluding service tax of 6%. It was also agreed that the fees to be billed at the conclusion of the suit. However this oral agreement as to the legal fees was denied by DW1 in his evidence; G

(g) Mr Sng ('PW1') left the firm of Sng & Co and joined Messrs Sulaiman & Taye as a partner on or about May 2011. He brought with him the defendant's file to Sulaiman & Taye and thereafter he continued handling the case. DW1 did not object to this and had several occasion, discussed with PW1 at Sulaiman & Taye pertaining to the said Suit 689; H

(h) when PW1 took over the defendant's case from Messrs Shook Lin & Bok, the defendant's suit against PPHB, the second defendant, has been struck out. On appeal to the Court of Appeal, which was handled by PW1, the appeal was allowed and the defendant's suit against the second defendant was reinstated; I

(i) in regards to the said Suit 689, on 31 May 2013 after full trial, judgment was entered by the High Court in favour of the defendant in this case with the following orders:

(i) PPHSB to pay the defendant RM1,082,759.18 for the balance of the cost of piling works done by the defendant;

(ii) PPHSB to pay the defendant RM200,000 as general damages for the delayed works caused by PPHSB and for the wasted expenditure;

(iii) PPHSB and PPHB counterclaim for liquidated assertained damages ('LAD') of RM1,101,000 was dismissed;

(iv) the defendant's claim against PPHB was dismissed; and

(v) PPHSB to pay costs of RM10,000 to the defendant and interest at 5%pa from the date of judgment to date of realisation;

(j) thereafter, the plaintiff issued two invoices to the defendant in this case for payment which are as follows:

(i) an invoice No 0062 dated 18 June 2013 for the sum of RM1,462.80 in regard to the transcript cost paid by Sulaiman & Taye for the notes of proceeding; and

(ii) an invoice No 0063 dated 3 July 2013 for the amount of RM275,000 for the agreed fees of RM260,000 and 6% service tax;

(k) the defendant, however, wrote a letter dated 10 July 2013 to the plaintiff objecting to the payment of the fees demanded by the plaintiff and requested the plaintiff to furnish a detail bill as well as to have the bill taxed as cost;

(l) as the defendant has failed to pay the amount claimed as in the invoices sent to the defendant, the plaintiff had issued a notice of demand dated 19 November 2013, but no payment was made by the defendant;

(m) the plaintiff then filed this suit against the defendant for the unpaid legal fees and costs of the transcript; and

(n) the defendant, on the other hand, filed a counterclaim against the plaintiff for negligent in conducting the Suit 689, which among others, causing the award for the defendant's claim for the delay and wasted expenditure to only RM200,000 instead of RM1.9m as pleaded. The defendant's counterclaim are for general and special damages, interest and cost.

THE PLAINTIFF'S CASE

[3] The plaintiff's claim is premised on an oral agreement between plaintiff and DW1 who acted for the defendant, for a lump sum legal fees of RM260,000 exclusive service tax of 6%.

[4] The plaintiff also contends that the amount agreed upon is reasonable based on the work done in handling the appeal at Court of Appeal to reinstate the second defendant as party to the suit and the conduct of the full trial of Suit 689.

THE DEFENDANT'S CASE AND ISSUES RAISED

[5] On the other hand, the defendant's case is that there was no such agreement for lump sum legal fees between PW1 and DW1.

[6] The defendant in his pleadings gave the following reasons to support the defendant's contention that there was no such agreement which are as follows:

(i) no bill was issued immediately after the alledged oral agreement; and

(ii) the bill issued by the plaintiff did not mentioned about an agreed fees.

[7] It was also submitted by counsel for the defendant that agreement as to costs must be in writing and signed by parties as required under s 116 of the Legal Profession Act 1976 ('the LPA'). The defendant also pleaded that the alledged oral agreement has violated ss 118 and 121(1)(a) of the LPA. As such the agreement is said to be void and invalid.

[8] The defendant further contends that the agreement, if any, is vague and not clear nor specific to be an enforceable agreement.

[9] Next, the defendant's counsel also argued that there was no privity of contract between plaintiff and the defendant as the agreement as to the fees, if any, was between Sng & Co and the defendant and not with Sulaiman & Taye.

[10] The defendant then contends that if there was such an agreement the amount of legal fees of RM275,000 is unfair and unreasonable.

FINDING OF THIS COURT

[11] It is an undisputed facts that no written agreement were made between parties in this case in regards to the amount of legal costs pursuant to s 116 of the LPA.

[12] Section 116 of the Act provides as follows:

> 116(1) Subject to any written law, an advocate and solicitor *may* make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of his costs in respect of contentious business done or to be done by such advocate and solicitor, either by a gross sum, or otherwise, and either that the same rate or at a greater or lesser rate than the rate at which he wouldotherwise be entitled to be remunerated.
>
> (2) Every such agreement shall be signed by the client and shall be subject to this Part.

[13] The first issue for defermination here is whether s 116 is a mandatory provision requiring any costs relating to contentious matter by advocate and solicitor to be reduced in writing and signed by the client.

[14] Here, the word 'may' in s 116(1) should be given its ordinary and natural meaning which is, it is permissive and not mandatory unless it can be shown otherwise.

In *Jagdish Kapoor v New Education Society* [1986] AIR MP1 the judge said this:

> It is well settled *that 'may' is a discreationary and enabling word*, unless the subject matter shows that the exercise of power given by provision using the word 'may' was intended to be imperative by the person whom the power is given.

[15] In the present case, there is nothing to indicate or basis to conclude that the word 'may' in s 116(1) of the LPA, should be read as 'shall' or 'must'.

[16] The Federal Court in *Gurbachan Singh s/o Bagawan Singh & Anor v Vellasamy s/o Pennusamy & Ors and other applications* [2012] 2 MLJ 149; [2012] 2 CLJ 663 citing with approval Lord Diplock's dictum in *Eng Mee Yong & Ors v Letchumanan* [1979] 1 LNS 18 agreed that the word 'may think just' means only a discreation.

[17] Here, the wordings of sub-s 116(1) is clear and unambiguous that an advocate and solicitor 'may' make an agreement in writing with the client with regard to the legal fees.

> The word 'may' here gives the option for advocate and solicitor whether to have a written agreement for the legal costs with the client or otherwise.

[18] I am of the same view with justice Idris Yusoff in *Dato' HL Wrigglesworth v Haji Zakaria bin Yusoff* [1995] MLJU 124; [1995] 3 CLJ 64 which says this:

> *To my mind the wordings of s 116 are clear. Section 116 is not a mandatory provision requiring the agreement to be reduced to writing* — it merely says that the solicitor

may make an agreement in writing and to make it binding, the client is required to sign it. If, however, for some reasons the agreement is not reduced to writing, it does not totally shut out the solicitor from claiming his cost for he can still fall back on s 121(1). In so doing the onus of proving that the costs are fair and reasonable, as usual, is on him unless it is a gross sum bill. He cannot avail himself of whatever benefits conferred by s 117. The avenues as created by s 121(1) give the solicitor the right of option, whether to present a bill containing detailed items or a gross sum bill.

[19] The meaning of word 'may' in s 116(1) has also been discussed and followed in the case of *Asbir, Hira Singh & Co v Supramaniam a/l Pitchaimuthu & Ors* [2000] 1 MLJ 83; [2000] 1 CLJ 7, where the judge explained as follows:

In fact, even without the written agreement, the plaintiff, on the facts, would have still succeeded in enforcing the oral agreement agreed to with D1 in 1982. It is not mandatory, to reduce that oral agreement into writing, for the plaintiff to prove that its was fair and reasonable. In *Dato' HL Wrigglesworth v Hj Zakaria bin Yusoff* [1995] MLJU 124; [1995] 3 CLJ 64, it was held by Idris bin Yusoff J, that:

> Section 116 is not a mandatory provision requiring the agreement to be reduced to writing — it merely says that the solicitor may make an agreement in writing and to make it binding, the client is required to sign it. If, however, for some reasons the agreement is not reduced to writing, it does not totally shut out the solicitor from claiming his costs for he can still fall back on s 121(1).

[20] As to the issue of violation of ss 118 and 121(1)(a) of the LPA, for ease of reference, the provisions are as follow:

(i) Section 118(1)

118(1) No action or suit shall be brought or instituted upon any agreement as is referred to in section 116, but every question respecting the validity or effect of any such agreement may be examined and determined, and the agreement may be enforced, varied or set aside by suit or action by summons, motion or petition by any person or the representatives of any person being a party to such agreement, or being alleged to be liable to pay, or being or claiming to be entitled to be paid the costs, fees, charges for disbursements in respect of which the agreement is made, by the Court in which the business or anyu part thereof was done, or a Judge of the Court, or, if the business was not done in any Court, then by the high Court or a Judge of the High Court.

(ii) Section 121(1)(a)

121(1) Where the remuneration of an advocate and solicitor in respect of contentious business done by him *is not the subject of* an agreement made pursuant to section 116, the solicitor's bill of costs *may* at the option of the advocate and solicitor either contain detailed items or be for a gross sum:

Provided that —

A (a) At any time before service upon him of a writ or other originating process for the recovery of costs included in a gross sum bill and before the expiration of three months from the date of the delivery to him of the bill, the party chargeable therewith may require the advocate and solicitor to deliver to him in lieu of the cost a bill containing detailed items, and the gross sum bill shall thereupon be of no effect;

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[21] The provision of sub-s 118(1) clearly refers to an agreement pursuant to s 116 of the LPA which is an agreement in writing and signed by the client which is not the situation in the present case. Therefore s 118 is not applicable.

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[22] I also find there is no infringment of s 121(1)(a) of the LPA by the plaintiff in this case. The plaintiff's case is that the plaintiff remuneration was a fixed sums agreed by both parties.

D **[23]** The next pertinent issue here is whether the plaintiff, on balance of probabilities, has proved the said oral agreement of the fixed legal fees.

[24] In this regards, Mr Sng ('PW1') in his evidence said that there was an oral agreement between PW1 and Mr Yong ('DW1') for an agreed legal fees of E RM260,000 excluding service tax of 6%. This oral agreement was made at the firm of Sng & Co and witnessed by PW2, who is also an advocate and solicitor who brought DW1 to see PW1 to discuss about PW1 pending suit against PPHSB and PPHM.

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[25] PW1 evidence was corroborated by PW2 who testified that there was such an agreement of fixed legal fees of RM260,000.

[26] In the invoice No 0063 dated 3 July 2013 which was sent to the defendant through the defendant's solicitor, at p 4, it stated the RM260,000 as G agreed fees and RM15,600 as 6% service tax.

[27] In response to the bill which was issued to the defendant, the defendant, vide letter dated 10 July 2013 to the plaintiff disputed the work done by the H plaintif as stated in the said invoice and contends that the fees is unjustified and oppressive. The defendant also requested for a detail bill and to have the bill taxed as costs.

[28] However, in the defendant's letter, a contemporaneous document, there I was no denial by the defendant of the said oral agreement of fixed legal fees in the sum of RM260,000 as said by PW1 and PW2, as well as stated in invoice No 0063 which was received by the defendant.

[29] The defendant, denies the said oral agreement with PW1 on fixed legal

fees of RM260,000 only in his testimony in court. However, the defendant admitted that there was discussion regarding legal fees at the firm of Sng & Co but the fees as discussed will be based on the work done by the plaintiff.

[30] Here, there is a conflict of evidence between PW1 and PW2 version with DW1 as regard to the said oral agreement of the lump sum legal fees of RM260,000.

[31] It is trite law that the court can rely on the contemporaneous decoument to resolve the conflict of evidence as explained by the Court of Appeal in the case of *Dato' Dr Zambry bin Abd Kadir v Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin (Attorney General of Malaysia, intervener)* [2009] 5 MLJ 464 where Raus Shariff JCA (as he then was) said this:

> [21] *It is trite law that when there is a conflict between the evidence witnesses, the court would resolve the conflict by relying on the uncontroverted documentary evidence which is neutral in nature. In Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 at p 234, Chang Min Tat FJ has this to say:
>
> > For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with the purpose of his own to serve and if it did not account for the statements in his documents and writing. Judicial reception of evidence requires that oral evidence be critically tested against the whole of the others evidence and the circumstances of the case. Plausibility should never be mistaken for veracity ...
>
> [22] In *Grace Shipping Inc & Anor v Cf Sharp & Co (Malaya) Pte Ltd* [1987] 1 MLJ 257, Lord Goff of Chiveley in delivering the judgment of the Privy Council, speaking on the same subject held that *it is of crucial importance for judges to have regard to the contemporary documents and to the overall probabilities when facing the task of assessing the evidence of witnesses* (see also *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anot* [1989] 1 MLJ 35; *Tan Sooi Shin v Kow Kek Hing* [1991] 3 MLJ 390; [1991] 3 CLJ 1985; and *Kumagai Gumi Co Ltd v Zenecon-Kumagi Sdn Bhd & Ors and another application* [1994] 2 MLJ 789).

[32] In the present case, the invoice dated 3 July 2013 and the defendant's letter dated 10 July 2013 reads in its totality corroborates the oral evidence of PW1 and PW2 with regard to the said oral agreement of legal fees of RM260,000.

[33] Having considered the evidence by both parties as mentioned earlier, my findings, on the balance of probabilities, is that, there was an oral agreement between PW1 and DW1 on a fixed legal fees of RM260,000 excluding the service tax.

[34] The evidence of PW1, PW2 and the invoice No 0063 shows that the agreed fix legal fees is clear and specific which is the sum of RM260,000. Therefore the contention that the amount agreed was vague and unclear is untenable.

[35] The oral agreement for the said fixed legal fees is enforceable pursuant to ss 9 and 10 of the Contracts Act 1950.

[36] Although, I have decided that s 118 is inapplicable to an oral agreement as in the present case, I also find the work done by plaintiff from May 2010–July 2013 which include the preparation, research work and other related matters including the conduct of the appeal at the Court of Appeal to reinstate the second defendant in the Suit 689 and the full trial in that case for the plaintiff is proportionate with the agreed fixed legal fees. The fees, based on the work done by plaintiff, to me, is fair and reasonable.

[37] As to the issue of no privity of contract between plaintiff and the defendant on the alledged agreed fees, firstly, it is not the defendant's pleaded case that plaintiff is not entitle to claim the fees as the plaintiff is not the party to the agreement. As such the issue should not be considered by this court (*Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal* [2015] 6 MLJ 492).

[38] In any event, considering the evidence adduced in court, DW1 himself admitted that the only counsel he liased with and gave his instruction was PW1 when PW1 was with Sng & Co. DW1 also did not object when PW1 continue to handle DW1's case when PW1 moved to Sulaiman & Taye. Infact DW1 continue meeting with PW1 and gave instruction after DW1 has moved to the plaintiff's firm. I agree with counsel for the plaintiff that the defendant had acquiesced by his conduct which continue to engage PW1 when PW1 has already moved to Sulaiman & Taye without any objection.

[39] In *MH Land Sdn Bhd & Anot v Ribbon Marketing Sdn Bhd & Ors* [2016] 6 CLJ 99, the judge had this to say:

> [62] A retainer does not have to be in writing and may be oral. It can also be inferred from acts subsequently done by the solicitor and acquiesced to by the client. In *Blyth v Fladgate* [1891] 1 Ch 337 the court held that though there had not been an express retainer, the relation of solicitor and client might be inferred from the acts of the parties.

[40] Hence, the defendant's contention on privity of contract is also without merit.

[41] In regards to the invoice No 0062, based on the evidence of PW1, the receipt of payment and the notes of proceeding produced in Bundle D8, I also find that the invoice No 0062 regarding the claim for costs of the transcript of the trial, has also been proven.

[42] Therefore, the plaintiff's claim against the defendant is allowed. The defendant is to pay the plaintiff the legal fees and disbursement including the service tax in the sum of RM275,924 and the transcript cost of RM1,462.80, with the total amount of RM277,386.80.

[43] The defendant is also ordered to pay interest of 5%pa of the judgment sum until realisation.

COUNTERCLAIM

[44] The counterclaim by the defendant against the plaintiff is for negligence in the conduct of the said Suit 689. The defendant contends that the plaintiff's negligence based on the following reasons:

(a) failing to adduce the available evidence to prove damages arising from the delay in the project cause by the defendant in the suit resulting nominal damages being awarded; and

(b) failing to adduce evidence and/or submit that interest on judgment sum should be awarded from the date of the writ and not from the date of judgment.

[45] In regards to this counterclaim, the plaintiff submits that it is unsustainable on the grounds of immunity and res judicata.

[46] The plaintiff argues that the plaintiff is not liable for the negligence as the act complained of is done in PW1 capacity as an advocate in the trial of Suit 689. The case of *Majid v Muthusamy* [1968] 2 MLJ 89 was relied upon to support the plaintiff's contention.

[47] As to the issue of res judicata, the plaintiff submits that the material evidence and issues with regard to the basis of the negligence claim has already been litigated and adjudicated in Suit 689 and as such, the counterclaim is an abuse of the court process.

[48] The principle of law is well settled that an advocate is not immune from a negligence suit. This has been decided by the Court of Appeal in the case of *Lim Soh Wah & Anor v Wong Chong & Anor & Another Appeal* [2001] 1 MLRA 116 where the judge said this:

A Our law has, however, always differed from English law, Advocates here have never enjoyed immunity from suit for negligence.

(See also *Ali bin Jais v Linton Albert & Anor* [1999] 6 MLJ 304; [1999] 4 CLJ 167.)

B **[49]** This principle of law, to me, is in line with the basic duty of care an advocate and solicitor owe to their client. They have the duty to exercise reasonable, skill and diligence in handling their client's case.

[50] As to the contention of res judicata, I find that what was adjudicated by
C the court in Suit 689, among others was whether the Borneo Synergy, the plaintiff in that case has proved the special damages as claim in the sum of RM1,942,438. However in the present case, the defendant counterclaim against the plaintiff is premised on the negligence of the plaintiff in conducting the case. This, to me, is two separate cause of action and the decision in this case
D will be based on a different consideration. Morever the parties in this suit and Suit 689 are different. As such the principle of res judicata is not applicable in the present case.

E **[51]** The pertinent issue here is, whether the defendant has proved the negligence act by the plaintiff in conducting Suit 689. In this regard the defendant has to establish on the balance of probabilities that PW1 had breached his duty of care and as the result the defendant has suffered damage which is not too remote.

F **[52]** Here, what constitute a breach by a solicitor has been explained in the case of *Maelstrom Resources Sdn Bhd and Anor v Shearn Delamore & Co (disaman sebagai firma)* [2006] MLJU 473; [2007] 1 CLJ 50 where the judge had this to say:

G As to what constitutes a breach generally, see the well known dictum of Baron Alderason in *Blyth v Birmingham Waterworks Co* [1856] 11 Exh 781 at p 784:

> *The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would do so.*

H

[53] Reverting to the present case, it is an undisputed fact the in Suit 689 the judgment is in favour of Borneo Synergy, the defendant in this case, whereby the court among others, ordered the defendant in that case to pay the
I outstanding sum of RM1,082,759.18 and general damages of RM200,000.

[54] As to the claim for damages arising from the said delay and wasted expenditure in the sum of RM1,941,438, it is not disputed that the claim was based on the documents in Bundles B5 and B7. The defendant's complaint is

that plaintiff had failed to refer these documents in defendant's witness statement or lead the relevant evidence to prove the damages.

[55] These Bundles B5 and B7 is in Part B documents and were before the court. In cross-examination of DW1 in the present case, he admitted that he was cross-examined in Suit 689 in relation to the RM1,941,438 claim and the details contents of B7 was used to crossed examined DW1.

[56] DW1 also admitted that the reasons for the said delay are contained in Bundle B5 which is the basis for the trial judge to decide that there was the delay by the defendant in Suit 689.

[57] In cross-examination, DW1 also agrees with the plaintiff's counsel that the evidence for the said RM1.9m is in Bundle B7.

[58] Therefore, I find the evidence in regards to the claim of RM1.9m was brought before the court in Suit 689 for determination.

[59] As to the issue on interest, in the plaintiff's statement of claim, the interest has been pleaded from the date of the writ.

[60] Having considered the evidence in totality, I am of the view that, the defendant has failed to prove negligence on part of the plaintiff in handling Suit 689.

[61] In the circumstances, the defendant counterclaim is dismissed.

[62] For both the plaintiff's claim and the defendant's counterclaim, the defendant is to pay the plaintiff costs of RM15,000 and costs is subject to payment of allocatur fee.

Plaintiff's claim allowed; defendant's counterclaim dismissed with cost of RM15,000 against defendant subject to payment of allocator fee.

Reported by Lee TJ